TAT SANG SDN BHD

v.

SAW & CO

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN YUNUS J
[ORIGINATING SUMMONS NO: D6-24-316-2001]
15 JULY 2002

CIVIL PROCEDURE: *Discovery - Inspection of documents - Principles applicable - Defendant's refusal to provide information to plaintiff - Whether such act of refusal falls within the ambit of the principle in Norwich Pharmacol Co v. Commissioners of Customs and Excise*

This was an application by the plaintiff seeking an order of this court to the effect that the defendant provides the plaintiff inspection and supplies copies of all documentation, working papers and notes pertaining to accounts that the defendant had audited. The plaintiff sought discovery against the defendant based on the principle in *Norwich Pharmacal Co v. Commissioners of Customs and Excise* ('the *Norwich Pharmacal* principle'); it contended that tortious acts had been committed by the former directors of the plaintiff company ('Tat Sang') and that the defendant had got mixed up in the former directors' tortious acts so as to facilitate their wrongdoings.

Held:

[1] There was nothing in the plaintiff's affidavit to show that the defendant, by reason of being the auditor of Tat Sang or otherwise, was linked to, or involved, or had anything to do with any of the alleged transactions by the directors of the company. Even assuming that the defendant was, as contended, under a moral duty to provide the information sought for by the plaintiff, the mere act of refusal on the defendant's part should not be regarded as tantamount to being mixed up in the tortious acts of the former directors so as to facilitate their alleged wrongdoings. Such an act of refusal, by itself, did not bring the present case within the ambit of the *Norwich Pharmacal* principle. (p 375 d-f)

[2] Furthermore, the purpose of invoking the *Norwich Pharmacal* principle was to enable the party wronged to identify the alleged wrongdoers. In the present case, however, it was clear that the plaintiff had knowledge as to the identity of the directors (the alleged perpetrators) who were responsible for the alleged wrongdoings. (p 375 g)

[Application dismissed.]

Case(s) referred to:
First Malaysia Finance Bhd v. Dato' Mohd Fathi Hj Ahmad [1993] 3 CLJ 329 ***(refd)***
Norwich Pharmacal Co v. Commissioners of Customs and Excise [1973] 2 All ER 943 ***(dist)***
Teoh Peng Phe v. Wan & Co [2001] 5 CLJ 222 ***(not foll)***

For the plaintiff - Gideon Tan; M/s Gideon Tan Razali Zaini
For the defendant - YB Cheong; M/s Prasad Abraham & Assocs

Reported by

JUDGMENT

Hishamudin Yunus J:
The plaintiff company, Tat Sang Sdn Bhd (hereinafter shall be referred to as "Tat Sang") was placed under receivership by Affin Bank Bhd pursuant to a debenture on 16 October 2001.

The defendant is a firm of auditors and has been the auditor for Tat Sang since about 1998. The defendant was commissioned by the board of directors of Tat Sang to carry out and had done a special audit on Tat Sang for the period ending 30 July 2001. It is not clear from the affidavits as to when exactly the defendant was commissioned by the board of directors of Tat Sang to carry out the special audit but it must have been some time after 30 July 2001. The receivers and managers of the Tat Sang, upon taking receivership, have been unable to obtain the books and accounting records of Tat Sang from the former directors of the company. When Tat Sang was placed under receivership in October 2001, the receivers and managers wrote to the defendant/auditor to request for a copy of the special audit report but the defendant refused to accede to the request. The reasons given for the refusal were that the report was confidential and that, in any case, the receivers and managers were not entitled to the same. Hence, the receivers and managers, in the name of Tat Sang, as plaintiff, filed the present originating summons. They seek an order of this court to the effect that the defendant do provide the plaintiff inspection and supply copies of all documentation, working papers and notes pertaining to the audited accounts for the periods ending 30 July 1998, 30 July 1999 and 30 July 2000 and the special audit for the period ending 30 June 2001.

This application by the plaintiff, seeking discovery against the defendant, is based on the *Norwich Pharmacal* principle (*Norwich Pharmacal Co v. Commissioners of Customs and Excise* [1973] 2 All ER 943).

I have on 28 March 2002 dismissed the application with costs and I shall now proceed to give my grounds.

I am of the view that the nature of the plaintiffs application does not come within the ambit of the *Norwich Pharmacal* principle. I so hold for two reasons.

First, it has not been established by the plaintiff that the defendant has been involved or mixed up with the tortious acts alleged by the plaintiff.

In *Norwich Pharmacal*, Lord Reid explained the scope of the principle as follows (at p. 948):

> My noble and learned friends Lord Cross of Chelsea and Lord Kilbrandon, have dealt with the authorities. They are not very satisfactory, not always easy to reconcile and in the end inconclusive. On the whole I think they favour the appellants, and I am particularly impressed by the views expressed by Lord Romilly MR and Lord Hatherley LC in *Upman v. Elkan* [1871] LR 12 Eq 140, 7 Ch App 130. They seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their own wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.

In the same case, Lord Morris of Borth-Y-Gest, in explaining the application of the principle, said (at p. 951):

> It is not suggested that in ordinary circumstances a court would require someone to impart to another some information which he may happen to have and which the latter would wish to have for the purpose of bringing some proceedings. At the very least the person possessing the information would have to have become actually involved (or actively concerned) in some transactions or arrangements as a result of which he has acquired the information.

The *Norwich Pharmacal* principle was adopted by our Supreme Court in *First Malaysia Finance Bhd v. Dato' Mohd Fathi Hj Ahmad* [1993] 3 CLJ 329. There, Edgar Joseph Jr SCJ, in delivering the decision of the Supreme Court, said (at pp. 333-334):

> Lord Reid reiterated the general rule that discovery to find the identity of the wrongdoer is available against anyone with whom the plaintiff has a cause of action in relation to the wrong. This is how his Lordship put it:
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> > So discovery to find the identity of a wrongdoer is available against anyone whom the plaintiff has a cause of action in relation to the same wrong. It is not available against a person who has no other connection

> with the wrong than that he was a spectator or has some document relating to it in his possession.

To the general rule aforesaid, there is, however, an exception exemplified by the *Norwich Pharmacal* case; the exception being that if, through no fault of his own, a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing, whilst he may incur no personal liability, yet is under a legal duty to assist the person who has been wronged by giving him full information and in making disclosure of the identity of the wrongdoers. In the words of Lord Reid:

> My noble and learned friends, Lord Cross of Chelsea and Lord Kilbrandon, have dealt with the authorities. They are not very satisfactory, not always easy to reconcile and in the end inconclusive. On the whole I think they favour the appellants, and I am particularly impressed by the views expressed by Lord Romilly MR and Lord Hatherley LC in *Upman v. Elkan* [1871] LR 12 Eq 140, 7 Ch App 130. They seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their own wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.

At a later part of the judgment, the Supreme Court defines the scope of the *Norwich Pharmacal* principle as follows:

> In our view, there can be no doubt that *Norwich Pharmacal* is in effect a consolidation of the early authorities on discovery, which the House had approved. We also note that the scope of the *Norwich Pharmacal* case is limited by the 'mere witness' and 'mere tort' rules. We would respectfully follow the principles enunciated by the House of Lords in the *Norwich Pharmacal* case and it was with those principles in mind that we turned to consider the particular circumstances of the present case in order to decide whether the judge was right in making the order he did in fact made.

Encik Gideon Tan argues that the duties of an auditor goes further than merely reporting what had financially transpired; and that, if in the course of auditing the accounts of the company, the auditor were to discover any wrongdoing, then they are under a moral duty to assist Tat Sang by providing full information as to the identity of the wrongdoers (see para. (iii) of the grounds in the originating summons). Learned counsel further submits that the auditor, by refusing to provide the plaintiff with the information sought, has facilitated the wrongdoings of the former directors. It is pointed out by Encik Gideon

Tan that the alleged refusal to provide the information sought and the alleged wrongdoings are set out in para. 5 and para. 6(a) and (d) of the plaintiffs affidavit at encl. 2. The said para. 5 states:

> 5. The Defendant had done a Special Audit on Tat Sang Sdn. Bhd. for the period ended 30/6/2001. The Receivers and Managers understand that the draft copy has been sent to the company prior to the receivership. The Receivers and Managers had requested an additional draft copy of the Special Audit from the Defendant but the Defendant refused to provide it. Now produced and shown to me is a copy of a letter dated 26/10/2001 exhibited hereto and marked as "KTAK-3".

Paragraph 6(a) and (d) states:

> 6. The Receivers and Managers are concerned that assets of the company could have been dissipated by the former directors and I respectfully state the reasons of belief as follows:
>
> (a) the last audited accounts for Tat Sang Sdn. Bhd. show fixed assets amounting to RM11,671,111.00 and net current assets amounting to RM25,026,489.00 as at 31/7/2000. However, it was announced by Tat Sang Holdings Bhd. that the company was sold for RM50,000.00. Now produced and shown to me is a copy of the company's last audited accounts and an article in The Edge dated 5/11/2001 collectively exhibited hereto and marked as "KTAK-4";
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> (d) after receivership, we were also informed by the Company Secretary on 23/10/2001 of the following:
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> (i) Directors' Circular Resolution dated 15/6/2001 for disposal of fixed assets amounting to RM7,670,474.24;
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> (ii) Directors' Circular Resolution dated 15/6/2001 for Bad Debts amounting to RM8,589,963.60 written off;
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> (iii) Directors' Circular Resolution dated 15/6/2001 for Disposal of Stocks & Raw Materials amounting to RM3,964,335.42;
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> (iv) Directors' Circular Resolution dated 15/6/2001 for Stocks amounting RM3,070,412.28 written off; and
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> (v) Directors' Circular Resolution for Restructuring Agreement dated 30/6/2001.
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> Now produced and shown to me is a copy of a letter dated 23/10/2001 and the aforesaid resolutions collectively exhibited hereto and marked as "KTAK-7". It seemed that these resolutions could have been backdated to justify the sale of the company for only RM50,000.00.

It is contended by learned counsel that the above affidavit discloses the commission of tortious acts: acts of dissipating the company's assets. And counsel submits that such acts tantamount to a breach of fiduciary duty on the part of the former directors of Tat Sang.

Without the need to analyse the above-mentioned paragraphs of the affidavit and assuming for a moment that tortious acts had in fact been committed by the former directors of Tat Sang, the question arises as to whether the plaintiff in the present case has clearly established that the defendant/auditor had got mixed up in the tortious acts of the former directors so as to facilitate their wrongdoings. In my considered judgment, the answer must be in the negative. In the case before me, it is not disputed that the defendant, Saw & Company, is an auditor appointed since 1998 to check and audit the accounts of the company (Tat Sang) and that subsequent to 30 June 2001 the board of directors of Tat Sang had commissioned the auditor to carry out a special audit on the financial affairs of the company for the period ending 30 June 2001. However, and significantly, there is nothing in the plaintiffs affidavit to show that the defendant, by reason of being the auditor of the Tat Sang or otherwise, is linked to or involved or had anything to do with any of the alleged transactions by the directors of the company, as set out in the affidavit. Even assuming that the defendant, as the auditor was, as contended, under a moral duty to provide the information sought for (the special audit report) by the plaintiff, yet I am hesitant to rule that the mere act of refusal on their part should be regarded as tantamount to being mixed up in the tortious acts of the former directors so as to facilitate their alleged wrongdoings. In other words, such mere act of refusal, by itself, does not bring the present case within the ambit of the *Norwich Pharmacal* principle.

My second ground in rejecting the present application is this. The purpose of invoking the *Norwich Pharmacal* principle, as explained by the House of Lords (in *Norwich Pharmacal*) and our Supreme Court (in *First Malaysia Finance*), is to enable the party wronged to identify the alleged wrongdoers. In the present case, however, it is clear from the exhibits, in particular, the various directors' circular resolutions signed by the directors and the company searches, that the plaintiff has knowledge as to who the directors (the alleged perpetrators) were that were responsible for alleged wrongdoings.

In coming to my decision in the present case, I have had the benefit of reading the judgment of HG Kang J in *Teoh Peng Phe v. Wan & Company* [2001] 5 CLJ 222, which was brought to my attention by Encik Gideon Tan. In that case, the learned judge, in his learned judgment, had posed this question:

> Are the auditors under a moral duty to provide the information and the identity of the wrongdoers?

Based on the evidence before the learned judge, his Lordship answered the question posed in the affirmative. And this factor appears to have been material in coming to the decision that his Lordship made.

With respect, in the present case before me, however, I am of the view that such a question is irrelevant in the context of the *Norwich Pharmacal* principle. To my mind, the relevant question is:

> Whether the defendant/auditor ever got mixed up in the (alleged) tortious act of the directors so as to facilitate their (the directors) own wrongdoing?

Based on the available evidence, I have already answered this question in the negative.

Accordingly, this application was dismissed with costs.